

LGNSW SUBMISSION

Feedback on Recommendations of Review of the Councillor Misconduct Framework

FEB 2023

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.



OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs **55,000 people**



Local government in NSW looks after more than **\$177 billion of community assets**



Local government in NSW spends more than **\$2.2 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has more than **350 council-run libraries that attract tens of millions of visits each year, and more than 400 public swimming and ocean pools**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **4 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

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Introduction

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to provide feedback on the “*Focus on Civic Responsibility: Councillor Conduct Accountability in New South Wales*” report. The report follows the completion of the review of the councillor misconduct framework by Mr Gary Kellar PSM (the Kellar Report).

This submission was endorsed by the LGNSW Board in February 2023.

Consultation Guide on the recommendations of the Kellar Report and potential changes to the NSW councillor misconduct framework

GENERAL COMMENT ON TIMING

LGNSW is disappointed by the short timeframe to provide feedback. The document is 77 pages in length and contains 48 recommendations which if implemented will result in sweeping changes to the current councillor misconduct framework.

It would have been preferable if the period of consultation made an allowance for the Christmas/New Year period when many councils and their staff take a break. This is also a period when most if not all, councils do not hold ordinary meetings. Asking for feedback during this time means that councils have insufficient time to properly canvas and consider views and will need to divert resources to do so. Consultation with stakeholders should not be rushed for such an important reform.

The Kellar Report was provided to the Minister for Local Government in October 2022 and whilst there is some urgency to begin the implementation of the reforms prior to the caretaker period, the date of the March election was known in October. There has been no explanation for the delay between October and 13 December 2022 in releasing the report.

LGNSW has provided a response to the feedback considerations identified in the dialogue boxes at the conclusion of each section of the Consultation Paper.

There are some matters for which no response has been provided as there is insufficient time to provide a substantive response on matters additional to that considered by the Kellar review. There are also responses where LGNSW has adopted the recommendations of the Kellar Report and the matters that were considered to make those recommendations.

GENERAL COMMENT ON OLG FUNDING AND RESOURCES

LGNSW agrees that the Office of Local Government (OLG) has very limited capacity under the current framework, structures and resourcing to effectively address the issues identified in the Kellar Report, and that systems, resources and practices available to the OLG are too constrained to adequately respond.

Irrespective of whether the current framework is maintained or the proposed new framework is implemented, a significant boost in OLG funding and resources is required to enable the OLG

to undertake its regulatory functions. The OLG will also require additional funding and resources during the implementation of the reforms.

LEGISLATE

How can the behavioural expectations and standards prescribed in the oath/affirmation of office in the Local Government Act 1993 be strengthened to ensure that behavioural standards are clear, in line with contemporary community expectations and enforceable?

LGNSW accepts the recommendations of the Kellar Report.

LGNSW notes that recommendation 6 of the Independent Commission Against Corruption (ICAC) Report, “*Investigation into the conduct of councillors of the former Canterbury City Council and others*” (Operation Dasha) was highly supportive of changes to the councillor oath of office as it provided “behavioural insights to realise positive public policy outcomes”.

What changes to the oath and affirmation of office would be beneficial?

LGNSW accepts the recommendations of the Kellar Report.

Do you support the introduction of prescribed types of misconduct and corresponding enforcement options (penalties and sanctions) shown in the Kellar Report (Attachment D)?

Where relevant, a separate response has been provided in this submission to individual types of prescribed misconduct but otherwise LGNSW accepts in general the recommendations of the Kellar Report.

EDUCATE

Do you support the introduction of pre-nomination training as a pre-condition for candidates standing for local government election?

LGNSW accepts in general the recommendations of the Kellar Report.

What mandatory pre-nomination training would be useful to prepare a candidate for local government office?

LGNSW accepts in general the recommendations of the Kellar Report and recommends that pre-nomination training includes an explanation of the reality of being a councillor, including the time commitment; the need for collaborative decision making; the financial restraints on a council’s ability to provide services; the role of the General Manager and the nature of conflicts of interest.

It is also recommended that the pre-nomination training be presented by persons such as former mayors and councillors and retired general managers as they are able to provide a real-world explanation of life as a councillor.

The Local Government (General) Regulation 2021 (the Regulation) currently requires mandatory training and professional development for all councillors and mayors in NSW. What mandatory professional training and capability development modules should be included in the training and professional development for councillors and mayors?

LGNSW accepts in general the recommendations of the Kellar Report and recommends that the following professional training and capability development modules be mandatory.

The Induction Program as set out in the 2018 “Councillor Induction and Professional Development Guidelines” but with additional modules provided separately that are focused on:

- (a) Meeting Procedures
- (b) Integrated Planning and Reporting
- (c) Local Government Financials
- (d) The Code of Conduct
- (e) The role of the General Manager (GM), including the relationship between the GM and the governing body; and the process of the performance review of the GM
- (f) Working Collaboratively
- (g) Local Government Planning

What is the minimum number of hours per year of mandatory training that councillors and mayors should be required to complete to build and maintain the skills necessary to perform their roles?

It is recommended that **ten** hours of mandatory training be undertaken in the first year of being elected.

However, as LGNSW does agree that there should be a penalty for failing to attend mandatory training within **six** months, there needs to be consideration as to which modules would need to be completed within the first six months. In addition to the Induction Program, LGNSW recommends that the mandatory training modules nominated to be taken within the first six months are the Meeting Procedures; Integrated Planning and Reporting and Local Government Financials modules.

What sanctions or penalties should be used to ensure compliance with mandatory training and professional development obligations?

The Kellar Report (at pg. 18) recommends that the completion of the required training be within three months of election, however LGNSW recommends that the mandatory training take place in the first six months following the election as per the current regulation. LGNSW agrees with the Induction Guidelines that the training “...should be timed to reflect the information the councillors and the mayor need in the first week, the first month and the first six months of council”. This is also to avoid councillors being overwhelmed with information.

If a councillor fails to complete the mandatory training that is nominated to be taken within the first six months, the penalty should be that the councillor cannot continue to attend meetings or other forums after that time as the councillor will not have acquired the necessary level of understanding for that meeting or forum. This will act as a bigger disincentive for councillors than imposing a financial penalty.

PREVENT

How can the transparency of council meetings be enhanced?

LGNSW accepts the recommendations at page 19 of the Kellar Report. In addition to the recommendation that:

XVI. That all meetings of councillors including workshops and briefings require written declarations and recordings of conflicts of interest.

LGNSW recommends that a councillor should be able to rely on a previous written declaration if there has been no change to the declaration. This could be done by a verbal declaration that there has been no change to a written declaration made previously and recording that verbal declaration in the minutes of the meeting.

All councils in NSW are required to webcast meetings of the council and committees whose membership comprises only of councillors. Should these meetings be live broadcast to enable real-time participation by communities?

LGNSW supports live broadcasting of meetings however as it may have resource implications for councils, LGNSW recommends a transition period to allow councils to source technology at a reasonable cost.

In addition to maintaining written records of councillor briefings and workshops, should audio-visual recordings be required to increase transparency and accountability to communities and reduce risks associated with lobbying?

This is strongly opposed. Only meetings that are open to the public should be audio-visually recorded.

Councillor briefings are the remit of the General Manager of the council, much like meetings between a Minister and the Secretary of the relevant Government Department.

It should be a matter for individual General Managers to determine if any of the business of the councillor briefings and workshops should be made public.

Should those recordings be placed on councils' websites (excluding the confidential business components)?

Recordings of council meetings and councillor only committee meetings should be placed on council's websites. The test of what meetings should be on a council's website is whether the meeting is open to the public.

How should existing provisions for the making and recording of declaration of conflicts of interest be strengthened?

LGNSW accepts the recommendations at page 20 of the Kellar Report except that for recommendation XVI that verbal declarations can be made when a councillor has previously made a written declaration and the circumstances of that declaration are unchanged.

Should all disclosures made at meetings, workshops and briefings be required to be made in writing and placed on an open access register on councils' websites?

LGNSW accepts in general the recommendations of the Kellar Report. However, as set out above, LGNSW recommends that a councillor should be able to rely on a previous written declaration if there has been no change to the declaration. This could be done by a verbal declaration that there has been no change to a written declaration made previously and recording that verbal declaration in the minutes of the meeting.

The Model Code of Meeting Practice for Local Councils in NSW currently states that public forums should not be held as part of a council or committee meeting. Should this separation be mandated?

LGNSW recognises that holding a public forum session within the council business agenda can invite disorder and the risk that “in the fervour of the moment the council moves to a formal resolution on a matter without due preparation, advice and deliberation”. LGNSW recommends that rather than mandate the separation of public forums from council and committee meeting, councils retain the ability to determine this for themselves. However, if public forums are held during council and committee meetings, the matters that are the subject of the public forum should only be considered after all the business on the business agenda is concluded. The items on the business paper should take preference over the matters that are the subject of the public forum.

In order to address decisions being made in reaction to vocal participants, it is recommended that the Model Code of Meeting Practice be amended to include, that before the council resolves anything the subject of a public submission, the council can only do so after the General Manager provides a written report outlining the implications of the request (including financial implications), except in circumstances where the General Manager is able to certify on the spot that a report is not helpful or necessary.

DEVOLVE/EMPOWER

What changes should be made to strengthen the powers and accountability of mayors and meeting chairs to manage the conduct and behaviour of councillors?

LGNSW accepts in general the recommendations of the Kellar Report.

What early intervention powers should the Councillor Conduct Commissioner be given to prevent and stop problematic behaviours quickly and prevent the escalation of complaints and reduce the subsequent number of formal interventions into councils?

Aside from the appointment of meeting conduct advisors or moderators, the Councillor Conduct Commissioner could be given the power to direct councillors to attend mediation or further training on working collaboratively. This power could be triggered when there is evidence that there is a pattern of behaviour that is not being deterred by other enforcement options.

A failure by a councillor to comply with a direction should be treated as a Type 3 integrity issue.

How could meeting conduct advisors or meeting moderators be empowered to assist in ensuring an appropriate standard of behaviour during meetings.

LGNSW accepts in general the recommendations of the Kellar Report.

How should the cost of the appointment of a meeting conduct adviser or meeting moderator be met, if an appointment is required?

Councils should meet the costs in the first instance; however, the reforms should not add to the cost burden of councils. This means that the Councillor Conduct Commissioner should be keeping a watching brief and be able to step in to ensure that the meeting advisor or moderator is making a difference.

DETECT AND MANAGE

Do you support the introduction of an independent Councillor Conduct Commission and conduct panels to assess, investigate and determine code of conduct complaints referred by councils?

LGNSW generally supports the introduction of an independent Councillor Conduct Commission and Independent Councillor Conduct Review Panels as proposed in the Kellar Report.

LGNSW is moderately concerned that the Independent Councillor Conduct Review Panels will perform both the role of “investigator” of code of conduct complaints and “decision maker” on disciplinary sanctions where allegations of misconduct are substantiated. However, we note that the integrity of the Independent Councillor Conduct Review Panels jurisdiction will be assured by affording appeal rights to aggrieved parties on the basis of denial of natural justice and through the usually available recourse to NCAT (i.e. appeals on matters of law and justice), with complaints about panel procedural performance being referred to the Commissioner for consideration.

Further work will be required when defining the jurisdictions of mayors/meeting chairs, Independent Councillor Conduct Review Panels, the Councillor Conduct Commissioner, NCAT and other agencies, and LGNSW would like to be involved in this.

When reviewing the performance of Independent Councillor Conduct Review Panels, such reviews should include consideration of whether the scope of their functions is appropriate and whether they are operating in accordance with natural justice and within the boundaries of their legislative and policy framework.

How could the introduction of the independent councillor conduct review panels (oversighted by the independent Councillor Conduct Commissioner) be implemented?

LGNSW accepts in general the recommendations of the Kellar Report. In particular LGNSW supports the establishment of a representative sector reference group, as described in the report, to oversee the process of implementation. LGNSW notes that the composition of the representative sector reference group includes peak bodies and would welcome an invitation to join such a body.

Further to this, an independent statutory officer similar to the Inspector of the Independent Commission Against Corruption (ICAC) should be appointed. The ongoing role would be, as for the ICAC Inspector, to oversee the operations and conduct of the independent Councillor

Conduct Commission and conduct panels so as to ensure they comply with the law and do not abuse the powers with which they are vested.

Do you agree with the introduction of regionally based independent conduct review panels?

Yes.

Are there any challenges for rural and remote councils? How could these be overcome?

A person employed by a council should not in any way be able to be part of a panel where that panel provides services to the employer council. This should apply whilst the person is employed by the council and for a period of 12 months after resignation from the council.

Which stakeholders should be consulted prior to determining how the panels could work and their composition?

The governing body and general managers of councils, LGNSW; professional associations and the OLG.

How should the jurisdiction and composition of each conduct review panel (the groupings of councils) be determined (e.g. by volume, location or other factors)?

LGNSW agrees with the discussion at paragraph 7.8 of the Report.

How can the investigations process be strengthened to ensure quality and consistency?

Part of the role of an Independent Inspector of the Councillor Conduct Commission would be to audit and ensure the quality of investigations.

Do you support the creation of mandatory investigation practice guidelines to provide consistency in the approach and quality of councillor misconduct investigations?

LGNSW agrees with and accepts the discussion at paragraph 7.13 of the Report.

DISCIPLINE

Are the penalties and sanctions proposed in the review Report (Attachment D) appropriate to deter poor behaviour and improve councillor conduct?

The conduct described in Type 1 as “(b) assaults or threatens to assault another councillor or person present at the meeting” warrants mandatory removal from a meeting and a referral to police. This is serious behaviour that should be dealt with outside the jurisdictional limits of the mayor.

The Type 2 and Type 3 options are comprehensive and offer an appropriate range of enforcement options.

Do you support the introduction of monetary and/or other penalties for certain integrity breaches such as failure to register or declare a pecuniary or significant conflict of interest?

This is not supported unless there are guidelines issued by the Councillor Conduct Commission on the imposition of penalties. There also needs to be a clearer explanation of the different types of conflicts of interest. This is because a significant conflict of interest may be defined as such but in fact have no bearing on the decision making of the councillor.

There needs to be clearer and more detailed guidance on what has to be declared before councillors can be penalised for failing to register or declare a conflicts of interest.

Do you agree that there should be partial or full cost recovery from councillors where they have been found to have committed repeated misconduct or integrity breaches or contributed to the unnecessary prolongation of an investigation (e.g. direct reimbursement by the councillor, suspension of councillor allowance, monetary penalties or fines)?

LGNSW agrees with these recommendations, but as with the imposition of penalties, the Councillor Conduct Commission should publish guidance material on how this would be imposed.

DIRECT, AUDIT and INTERVENE

How should the OLG interface with the Conduct Commission and conduct review panels?

LGNSW agrees with and accepts the discussion at paragraph 7.8 of the Report.

It would assist the establishment and operation of the Conduct Commission if there was a statutory information sharing power between the two organisations similar to that provided for at s271A of the *Work Health and Safety Act 2011*.

ASSURE EQUITY

Do you support the process for procedural fairness outlined in the review Report?

LGNSW accepts the recommendation of the Kellar Report.

Should a Code of Conduct for Independent Councillor Conduct Review Panels be developed?

Yes.

IMPLEMENTATION

In 2020/21 a total of 384 code of conduct complaints were lodged at an average cost to NSW councils of \$14,796 per complaint, or over \$2 million, excluding OLG costs.

Do you support the introduction of a framework where the costs of the independent Commissioner and conduct review panels are borne by councils who generate misconduct complaints (fee for service model)?

A fee for service model would act as a deterrent to misconduct as it is the elected body that is responsible to its community for how it spends its budget. However, the reforms should not add to the current cost burden of councils and a review should be conducted following 12 months of operation to consider this aspect of the reforms. If the reforms are working, the costs to councils should be reduced, if not, a cap on the costs to councils should be considered.

Do you support the establishment of set rates for panel members attending meetings and conducting complaint investigations?

Yes.

Would a schedule of panel rates, set annually, assist councils in preparing their annual budgets and forecasting expenditure?

If councils are required to fund the review panels on a fee for service model, then a schedule of panel rates should be set annually by statute.

Would the publication of the costs of individual councillor misconduct investigations in councils' annual Reports and in a central conduct register improve transparency and councillor accountability to communities?

Yes.

Should OLG pursue full cost recovery from councils in instances where formal interventions to correct council performance are necessary as a result of misconduct (e.g.: issuance of a performance improvement order)?

No. The only cost recovery should be in the circumstances set out in Appendix D.

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For further information on this draft submission, please contact LGNSW Legal Officer Liz Hayes at elizabeth.hayes@lgnsw.org.au.